

**In the District Court of the United States  
for the Southern District of Indiana,  
Indianapolis Division**

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**CIVIL ACTION No. 781**

[Filed Aug. 25, 1944. Albert C. Sogemeier, Clerk]

**HARRY A. PARKER, DOING BUSINESS AS PARKER  
MOTOR FREIGHT, ET AL., PLAINTIFFS**

**v.**

**UNITED STATES OF AMERICA, ET AL., DEFENDANTS**

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**JURISDICTIONAL STATEMENT BY DEFENDANT-APPELLANT,  
UNITED STATES OF AMERICA, UNDER RULE 12  
OF THE REVISED RULES OF THE SUPREME COURT OF  
THE UNITED STATES**

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The defendant-appellant, United States of America, respectfully presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed.

**A. STATUTORY PROVISIONS**

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended

by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539, as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

**B. THE STATUTE OF A STATE, OR STATUTES OR TREATY OF THE UNITED STATES, THE VALIDITY OF WHICH IS INVOLVED**

The validity of a statute of a State, or of a statute or treaty of the United States, is not involved.

**C. DATE OF THE JUDGMENT OR DECREE SOUGHT TO BE REVIEWED AND THE DATE UPON WHICH THE APPLICATION FOR APPEAL WAS PRESENTED**

The decree sought to be reviewed was entered on June 30, 1944. The petition for appeal was

presented and allowed on August 25, 1944. On the same day an assignment of errors was filed.

#### D. NATURE OF CAUSE AND RULINGS BELOW

This is an appeal from a final decree of a specially constituted three-judge District Court of the United States for the Southern District of Indiana, Indianapolis Division, entered June 30, 1944, declaring an order of the Interstate Commerce Commission illegal and void and enjoining its enforcement. The order in question was entered by the Commission on September 25, 1943, in a proceeding known as *The Willett Company of Indiana, Inc., Extension—Fort Wayne-Mackinaw City, Mich.*, Docket No. MC 2815 (Sub. No. B), reported 42 M. C. C. 721. This proceeding was an application by The Willett Company for a certificate of public convenience and necessity under Sections 206 (a) and 207 (a) of the Interstate Commerce Act. Authority was sought to inaugurate over seven specified routes a trucking service auxiliary to and supplemental of, the rail service of the Pennsylvania Railroad in the transportation of less-than-carload freight. Compare *Thomson v. United States*, 321 U. S. 19, 20, 21.

By its report and said order of September 25, 1943, the Commission found that the present and future public convenience and necessity required the proposed operation, subject to conditions designed to restrict it to a coordinated motor-rail service, and directed that an appropriate certifi-

cate issue.\* Subsequently a petition for reconsideration filed by protestants was considered and denied by the entire Commission by order dated February 8, 1944.

On February 21, 1944, suit to set aside this order, pursuant to the provisions of Section 41 (28) and Sections 43 to 48, inclusive, of Title 28 U. S. C., was filed by Harry A. Parker, doing business as Parker Motor Freight, a motor carrier protestant in the Commission proceeding. Several other motor carriers, The Regular Common Carrier Conference of the American Trucking Associations, Inc., and Motor Carriers Central Freight Association intervened as parties plaintiff. The Interstate Commerce Commission, The Willett Company of Indiana, Inc., and The Pennsylvania Railroad Company intervened as parties defendant. The case was submitted on final hearing on April 28, 1944, before a specially constituted three-judge court. On June 30, 1944, without filing any written opinion, the Court filed its special findings of fact and conclusions of law and entered its final decree enjoining the enforcement of the Commission's order. In so doing it found applicant had failed to meet the statutory requirements and that the Commission had failed to exact from the applicant, as a railroad subsidiary, the requisite proof to establish public convenience and

\*By agreement the issuance of the certificate was subsequently deferred pending the disposition of the proceeding in the District Court.

necessity and that there was no substantial evidence to support the order.

Substantial and important questions are presented by this appeal, relating to the proper construction of Section 207 of the Interstate Commerce Act, and the proper statutory standards to be applied by the Commission in passing upon applications for certificates of public convenience and necessity under that provision of the Act. Before the District Court plaintiffs made two principal contentions, which the Court appears to have adopted: (1) That the Commission based its decision solely on the fact that the railroad would benefit from the substitution of motor carrier service for its existing rail service and that the Commission thus employed a test of railroad convenience and necessity in lieu of the proper test under the statute of "public convenience and necessity"; and (2) that "public convenience and necessity" in this statute connotes absolute necessity, so that new operations cannot lawfully be authorized where existing operators could take care of the need. While we agree that the Commission could not have applied a test of railroad convenience and necessity, we, nevertheless, think it is clear that the Court was clearly wrong in accepting plaintiffs' contentions. We think it is plain, first, that the Commission did not base its decision on mere railroad convenience, or depart from the usual standard of public convenience and necessity. Thus, not only does the Commission's

report refer to abundant shipper testimony in support of this new service, but the report also states (42 M. C. C. 721, 726) with respect to the proposed service:

It is a new form of service utilizing both rail and motor-carrier transportation to advantage and in such a way as to render a merchandise service which is much less expensive and at the same time *more expeditious and more convenient and generally satisfactory to the public served.* [Italics supplied.]

Also, just as it has traditionally done in the more usual case where the applicant is not a railroad-controlled motor carrier, the Commission here specifically considered the effect of the new service upon existing motor carriers and concluded that it did not appear that the new service would be directly competitive with, or unduly prejudicial to, the operations of any other motor carrier. Secondly, it is equally clear that the statutory test is not one of absolute necessity. For this Court has recognized that new service may be authorized for the very purpose of providing the public with the benefits of competition, and also that if additional service is necessary the Commission is under no obligation to require existing carriers to improve their service before authorizing the entry of a new carrier into the field. *Chesapeake & Ohio Ry. Co. v. United States*, 285 U. S. 35, 41-43; *Davidson Transfer & Storage Co. v. United*

*States*, 42 F. Supp. 215, 219 (D. C. E. D. Pa.), affirmed *per curiam*, 317 U. S. 587. The substantiality of the issues here is also indicated by the fact that on July 17, 1944, a three-judge District Court for the Eastern District of Virginia in *American Trucking Associations, Inc. v. United States*, No. 285, sustained a Commission order granting a certificate to another railroad to engage in somewhat similar motor carrier operations. Some of the present contentions, as well as others, were also made in that case.

**E. CASES SUSTAINING THE SUPREME COURT'S  
JURISDICTION ON APPEAL**

*United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475.

*Alton Railroad Co. v. United States*, 315 U. S. 15.

*Noble v. United States*, 319 U. S. 88.

*Crescent Express Lines v. United States*, 320 U. S. 401.

*Board of Trade of Kansas City v. United States*, 314 U. S. 534.

*Union Stock Yard Co. v. United States*, 308 U. S. 213.

*United States v. Pan American Petroleum Corp.*, 304 U. S. 156.

*United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402.

*United States v. Baltimore & Ohio R. R. Co.*, 293 U. S. 454.

*Mississippi Valley Barge Co. v. United States*,  
292 U. S. 282.

**F. DECREE AND FINDINGS OF FACT AND CONCLUSIONS  
OF LAW OF THE DISTRICT COURT**

Appended to this statement is a copy of the findings of fact and conclusions of law of the District Court and a copy of decree of said Court sought to be reviewed.

The United States of America, therefore, respectfully submits that the Supreme Court has jurisdiction of the appeal.

Dated August 24, 1944.

CHARLES FAHY,  
*Solicitor General.*

WENDELL BERGE,  
*Assistant Attorney General.*

ROBERT L. PIERCE,

EDWARD DUMBAULD,

*Special Assistants to the Attorney General.*

B. HOWARD CAUGHRAN,

*United States Attorney.*

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(CLERK'S NOTE.—The findings of fact, conclusions of law and decree are printed as an appendix to the jurisdictional statement in the case of *I. C. C. et al. v. Parker, etc., et al.* No. 507, October Term, 1944, and are not duplicated here.)